

DIVISION IV

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, Judge

CA05-1235

MAY 17, 2006

AMY MICHELLE McCARTY

APPELLANT

V.

APPEAL FROM THE WHITE
COUNTY CIRCUIT COURT
[NO. DR 2002-120-2]

MICHAEL JOHN McCARTY

HON. ROBERT CRAIG HANNAH,
CIRCUIT JUDGE

APPELLEE

AFFIRMED IN PART; REVERSED IN
PART AND REMANDED

Amy Michelle McCarty appeals from the portion of a White County Circuit Court divorce decree that awarded an unequal distribution of certain marital accounts to Michael John McCarty. On appeal, she argues that the trial court erred in finding sufficient evidence to support an unequal division of the parties' marital property, and alternatively, failed to sufficiently state the reason for an unequal division. We affirm in part and reverse and remand in part.

Amy and Michael were married on May 31, 2001. On February 15, 2005, Michael filed a complaint for divorce, alleging general indignities. He later filed an amended complaint that also alleged adultery. Amy did not contest the grounds. The relevant testimony adduced at the June 8, 2005, hearing on the divorce petition is as follows.

Amy testified that she and Michael last lived together in March of 2004, when Michael "shipped out" for Iraq. Subsequent to his deployment, she accepted a job as a high school English teacher in the Heber Springs School District, at a salary of \$28,500. She also earned \$500 per month in drill pay from the National Guard. She claimed that, when she

moved to Heber Springs, she still had expenses associated with the house the parties' owned in Jonesboro, where the parties had previously resided. She admitted, however, that her residence in Heber Springs was owned by her parents and that she was only responsible for paying for her utilities. Amy described her additional expenses as food, clothing, insurance, and car payments.

Amy admitted that, while Michael was in Iraq, she began living with Chad Davis. Davis was unemployed at the time. During her relationship with Davis, Amy "helped him with money," but claimed he paid her back despite the fact that he had only gotten a job approximately one month before the hearing. She claimed that he got a "substantial amount" of money from someone who had claimed Davis's son as a deduction on their income tax. Amy also admitted to buying clothes for Davis, as well as paying for his food when they went out to eat and paying for his lodging when he stayed with her during military drill weekends in Jonesboro.

Amy conceded that, during the time she was living in Heber Springs, she was spending "in the neighborhood" of four thousand dollars a month. According to Amy, her take-home pay from her teaching job was approximately \$1,800 per month, her guard drill pay was \$500, and she received \$1,500 per month from Michael's military pay. Nonetheless, she was not able to explain why she made three fifteen-hundred dollar withdrawals from the Bank of America account on December 9, 2004, December 27, 2004, and January 5, 2005. Amy conceded that she had no documentation to justify any of her expenditures. She also admitted that she sold a refrigerator, which was marital property, to the parents of her paramour, Chad Davis.

Major Jonathan Stubbs testified that he served with Michael in Iraq. He described Michael as "an exceptional soldier" and his "strongest and best platoon leader." Major

Stubbs stated that Michael excelled at leading his platoon in a “very volatile” section of Baghdad. Regarding Michael’s military service, he opined that Michael “developed as a leader, as a manager” and that the “deployment advanced [Michael], and it was an asset to him.”

Michael testified that Amy had an account in her name in which her earnings were deposited. He confirmed that he agreed to contribute \$1,500 per month from his military pay to help with household expenses, and he allowed her to withdraw that amount from a Bank of America account that was funded solely from his earnings. At the time of the hearing, the Bank of America account had a balance of \$16,820.14. Michael also had what he called a “Government Savings Bank account” that had a \$10,000 balance. He stated that, while he was deployed in Iraq, he earned approximately \$5,000 per month in tax-free money. All of the money that he had in the Government Savings account was earned while he was in the war zone and came from the extra \$1,000 per month he earned for hazardous duty while in Iraq. Michael admitted that, when he found out about Amy’s adulterous relationship, he rolled the joint Bank of America account into a personal account. Once he did that, he took over maintaining the payments on their former residence in Jonesboro, sending his mother money to pay the mortgage and miscellaneous bills. He stated he believed that Amy had already taken her half of the Bank of America account. Michael claimed that he had requested to see what Amy had spent the money on, but she refused to give him access to the bank statements. He also noted that he was annoyed to hear that Amy had sold the refrigerator because it had cost approximately \$800.

Regarding future employment, Michael testified that he did not believe that he was going to continue in the military. He stated that his military training was limited—he was only trained to be an infantry officer. Michael admitted, however, he had been a laborer for

a construction company, had “done an apprenticeship as a jeweler,” had taught R.O.T.C. in a “temporary” position at Arkansas State University, and was raised on a farm and had a four-year degree in agriculture. He stated that he had been undergoing counseling since he returned from Iraq and that he was taking a “serotonin inhibitor” to deal with his anxiety.

Michael claimed that he was still affected by the combat situations that he had endured in Iraq. He described at length many of the harrowing combat encounters for which he received decorations for bravery. He also stated that he received a shrapnel wound to his ear while in combat. Michael admitted, however, that he had only made a slight effort to find employment, wanting to resolve his divorce case before he planned to search in earnest. He stated since his deployment, he was receiving extended unemployment benefits.

The trial judge granted the divorce on the grounds of adultery. He stated, however that “fault in a divorce plays no role in the division of property.” Nonetheless, he granted Michael all of the Government Savings account, finding that:

most of that money, if not all, [came] from the enhanced pay that Mr. McCarty got while he was in Iraq. Because of the length of the marriage, I don’t think it’s fair for that to be equally divided. He earned that and I’m going to allow him to keep that. On the Bank of America joint checking account, I find that there was a balance of \$16,820.14, and because of the length of the marriage and Mr. McCarthy’s employability in the occupation he has, which he says he can’t continue, I don’t think he can because of his — just because of what all he saw and he’s taking medications for that, I’m going to allow him to keep eight thousand dollars of that to help him get settled and start a job, and the balance will be split between the parties.

The trial judge directed, however, that marital bills and other expenses associated with the Jonesboro house should first be deducted from the balance.

On appeal, Amy argues that the trial court erred in finding sufficient evidence to support an unequal division of the parties’ marital property, and alternatively, failed to sufficiently state the reason for an unequal division. She acknowledges that Arkansas Code Annotated section 9-12-315(a) (Repl. 2002), allows for a unequal distribution provided that

the trial court makes findings that support that distribution, and acknowledged that the trial court identified “the length of the marriage” as one statutory consideration for the unequal division of the accounts, but asserts that the trial court’s citation of this factor did not constitute a finding. Further, she concedes that the statutory factor relating to “contribution of each party in acquisition, preservation, or appreciation of the marital property,” could support an unequal distribution, but argues that it was “not mentioned.” She urges us to find analogous our recent decision in *Baxley v. Baxley*, 86 Ark. App. 200, 167 S.W.3d 158 (2005), where we reversed an unequal distribution of investment accounts that were given to the appellee because “they’re from her sole earnings.” Amy also cites *Davis v. Davis*, 79 Ark. App. 178, 84 S.W.3d 447 (2002), as support for the proposition that the trial court’s findings justifying an unequal distribution were inadequate.

Amy also contends that the division of the Bank of America account was error because the trial court’s reliance on the employability of the party was erroneous. She states that “the great weight of [Michael’s] testimony supports the position that the divorce, the grounds under which the divorce arose and the desire to have this proceeding behind him is what has kept [him] from obtaining employment, not anything he saw during his deployment.” Further, she discounts the mental and emotional upheaval that Michael was enduring. Amy notes that the trial court also referenced the length of the marriage, but contends that this reference also did not constitute a finding.

We review traditional equity cases de novo on the record and will not reverse a finding of fact by the trial judge unless it is clearly against the preponderance of the evidence. *Williams v. Williams*, 82 Ark. App. 294, 108 S.W.3d 629 (2003). In reviewing the trial judge's findings, we give due deference to the judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id.* A finding

is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Skokos v. Skokos*, 344 Ark. 420, 40 S.W.3d 768 (2001). In order to demonstrate that the trial court's ruling was erroneous, an appellant must show that the trial court abused its discretion by making a decision that was arbitrary or groundless. *Id.*

In *Copeland v. Copeland*, 84 Ark. App. 303, 139 S.W.3d 145 (2003), we noted that the overriding purpose of Arkansas Code Annotated section 9-12-315 is to enable the court to make a division of property that is fair and equitable under the specific circumstances. Marital property is to be divided equally unless it would be inequitable to do so, and if the property is divided unequally, then the court must give reasons for its division in the order. *Id.* The factors listed in section 9-12-315(a)(1)(A), although not an exhaustive list, include the length of the marriage; age, health and station in life of the parties; occupation of the parties; amount and sources of income; vocational skills; employability; estate, liabilities, and needs of each party and opportunity of each for further acquisition of capital assets and income; contribution of each party in acquisition, preservation, or appreciation of marital property, including services as a homemaker; and the federal income-tax consequences of the court's division of property.

Regarding the division of what has been called the Government Savings account, we hold that the trial court made adequate findings in support of his division. First, we disagree that the trial judge's statement that the marriage was of short duration did not constitute a "finding." A finding is defined as "the result of the deliberations of a jury or a court. A decision upon a question of fact reached as the result of a judicial examination or investigation by a court." *Black's Law Dictionary* 437 (6th ed. 1991). Here the trial judge's reference to the length of the marriage was in accordance with the statutory factors Arkansas

Code Annotated section 9-12-315(a)(1)(A)(I) that must be considered before making an unequal division of property.

We note further that the trial judge also stated that “most of that money, if not all, [came] from the enhanced pay that Mr. McCarty got while he was in Iraq.” We note that Amy herself concedes that this finding corresponds to another of the statutory factors listed in Arkansas Code Annotated section 9-12-315(a)(1)(A)(iv): the “Amount and sources of income.” Indeed, Amy candidly acknowledges that this factor “could” justify an unequal division of that account. We are mindful that this court has, in interpreting whether it was equitable to grant an unequal division of property in accordance with this factor, a requirement that there has been some wastage of marital assets on the part of the party receiving the lesser share. *Baxley v. Baxley*, ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 7, 2005); *see Keathley v. Keathley*, 76 Ark. App. 150, 61 S.W.3d 219 (2001) (affirming an unequal division of marital property in favor of the spouse whose labor resulted in its acquisition where the other spouse essentially looted marital assets); *Forsgren v. Forsgren*, 4 Ark. App. 286, 630 S.W.2d 64 (1982)(affirming an unequal division of marital property where the appellant wife was “guilty of excessive consumption of alcohol and drugs,” activities that resulted in “massive medical bills and marital problems between the parties”). However, upon de novo review, we note there is ample evidence that Amy looted the marital assets by providing money and support for her paramour.

Furthermore, this money was found to have come from combat pay that Michael received solely because he was in imminent danger while stationed in Iraq. To say the least, the source of these funds was not simply employment that caused Michael to be physically distant from his spouse. The statutory factors enumerated in section 9-12-315 are not an exhaustive list. *Copeland v. Copeland*, *supra*. Accordingly, under the facts of this case we

cannot say that the trial judge's decision to award the Government Savings account funds to Michael was clearly erroneous.

We have a different conclusion with regards to the Bank of America account. We find merit in Amy's argument concerning Michael's employability. Michael conceded that he had made only a limited search for employment, preferring that his divorce case be resolved before he embarked on his next career. From the testimony, both from Michael and Major Stubbs, we can reach no other tenable conclusion than that he possesses exceptional leadership skills and a wide range of experience. Michael stated that he was a college graduate and admitted to working as a construction worker, farmer, jeweler, and teacher in addition to being a highly-decorated military officer. Furthermore, we note that Michael testified that he was receiving "extended unemployment benefits" to tide him over in his job search. We therefore hold that the trial judge's finding that Michael's employability justified an unequal division of the Bank of America account was clearly erroneous. Accordingly we reverse and remand for the entry of an order dividing this marital asset equally between the parties. *Baxley v. Baxley*, ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 7, 2005).

Affirmed in part; reversed in part and remanded.

VAUGHT and ROAF, JJ., agree